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CHARLES ELMORE DROMM

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 721

CAPITOL WINE & SPIRIT CORPORATION,
Petitioner,
vs.

STEWART BERKSHIRE, AS DEPUTY COMMISSIONER OF
THE BUREAU OF INTERNAL REVENUE, IN CHARGE OF THE
ALCOHOL TAX UNIT, HENRY MORGENTHAU, JR., AS
SECRETARY OF THE TREASURY, AND B. R. RHEES, AS DISTRICT
SUPERVISOR OF THE ALCOHOL TAX UNIT, BUREAU OF INTER-
NAL REVENUE, SECOND DISTRICT OF NEW YORK.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

JOSEPH P. TUMULTY, JR.,
Counsel for Petitioner.

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NAL REVENUE, SECOND DISTRICT OF NEW YORK.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

*To the Honorable Harlan F. Stone, Chief Justice of the
United States, and the Associate Justices of the Supreme
Court of the United States:*

The petitioner, Capitol Wine & Spirit Corporation, re-
spectfully prays that a writ of certiorari be issued to re-
view the judgment and decree of the United States Circuit
Court of Appeals for the Second Circuit filed in the above

proceeding on October 8, 1945 (R. 359), which judgment and decree affirmed the orders dated October 11, 1943 (R. 303), and March 17, 1944 (R. 338) issued by these respondents.

I. Opinion of Court Below

The opinion of the Circuit Court of Appeals for the Second Circuit, rendered by Swan, J., is reported in 150 F(2nd) at 619, and is printed in the record (R. 346).

II. Summary Statement of the Matter Involved

The matter involves orders issued by the respondents annulling, for alleged fraud, misrepresentation or concealment of material facts in its procurement, a basic permit as a wholesaler of distilled spirits, wine and malt beverages issued under the Federal Alcohol Administration Act (49 Stat. 977, 27 U. S. C. Sec. 201) on March 1, 1936 (R. 196), to the petitioner, an importer and wholesaler of liquor.

The petitioner was on May 25, 1935, and still is, a possessor and holder of a basic permit as an importer of liquors issued by the Federal Alcohol Administration on February 1, 1934 (R. 12-13).

A Wholesaler's Basic Permit was issued by the same authority to petitioner on July 1, 1936 (R. 196), on an application therefor dated January 28, 1936 (R. 175).

Petitioner has been engaged in the liquor wholesaling and importing business since 1934. It had been engaged in said business for nine years prior to the institution of the proceeding for the annulment of its Wholesaler's Basic Permit.

Petitioner has an annual volume of business in excess of \$15,000,000, employs approximately 350 people, and operates offices and warehouses in New York City, Buffalo, Rochester and Newburgh, in the State of New York (R. 139).

Petitioner has been regularly conducting its business pending the final determination of these proceedings. No charges have ever been instituted against petitioner for suspension or revocation of its permits¹ and there is no suggestion in the record that its operations in the period prior to the institution of the annulment proceeding were not in entire conformity with the law.

On January 4, 1943, the District Supervisor of the Alcohol Tax Unit, Bureau of Internal Revenue, Second District of New York, instituted a proceeding for the annulment of petitioner's Wholesaler's Basic Permit. The citation issued by the District Supervisor ordered petitioner to show cause why such permit should not be annulled and stated that the District Supervisor had reason to believe that the permit was procured through fraud or misrepresentation or concealment of material facts (R. 165). Hearing pursuant to the order was held before Frederick D. Sillaway, Esquire, an attorney in the Alcohol Tax Unit, who was designated as the Hearing Officer by the District Supervisor of the Alcohol Tax Unit (R. 164). With respect to this proceeding petitioner in its brief in the court below stated, on page 48 thereof: " * * * The Respondent Rhees, who issued the citation and, therefore, acted the part of the complainant, designated Smith, a lawyer on his staff, to prosecute the charges before another lawyer on his staff named Sillaway, who sat as the Hearing Officer. The Respondent Rhees, therefore put himself in the very obvious category of being the complainant, the prosecutor and the judge."

On October 9, 1943, the Hearing Officer rendered his findings and recommended that petitioner's Wholesaler's Basic Permit be annulled (R. 257).

¹ This statement is based upon a statement "*in haec verba*" in petitioner's brief in the court below on page 46 thereof.

On October 11, 1943, respondent Rhees, the District Supervisor, adopted the findings of the Hearing Officer and issued an order annulling the petitioner's Wholesaler's Basic Permit for fraud, misrepresentation and concealment of material facts (R. 303).² Petitioner applied for reconsideration of this order and on December 2, 1943, the District Supervisor, after hearing oral argument, affirmed the order (R. 322).

Petitioner sought review of the findings and order by respondent Berkshire, the Deputy Commissioner of Internal Revenue in charge of the Alcohol Tax Unit (R. 325), which review resulted in an order dated March 17, 1944, affirming the orders and action of the District Supervisor in annulling petitioner's Wholesaler's Basic Permit (R. 338).

The Deputy Commissioner of Internal Revenue made no independent findings, but merely found (R. 339) that "*the findings and the aforesaid orders of said District Supervisor were supported by substantial evidence in the record and by provisions of the Federal Alcohol Administration Act and existing regulations and that the orders in question were not of an arbitrary nature and that the procedure and the District Supervisor's action in annulling the aforesaid basic permit were not contrary to law and regulations*" (Italics supplied).

No proceedings were brought by respondents to annul or revoke petitioner's Importer's Basic Permit issued on February 1, 1934, by the Administrator of the Federal Alco-

² It will be noted that the District Supervisor adopted the Hearing Officer's findings within two days after their issuance and, under the administrative procedure followed in this case, without previously affording petitioner any opportunity for the submission of exceptions or objections thereto. In applying to the District Supervisor for reconsideration petitioner was, therefore, required to assume the burden of persuading the District Supervisor to reverse himself upon a matter already decided by him and made a matter of record.

hol Control Administration, an agency of the Federal Government (R. 12-13).

The orders appealed from annul petitioner's Wholesaler's Basic Permit for reasons which may be summarized as follows (R. 304-6) :

- (a) That the applicant (petitioner) procured such permit through fraud, or misrepresentation, or concealment of material facts;
- (b) That the application failed to reveal, or misrepresented or concealed the interests in applicant of Louis Pokrass, Charles D. Cook and Harry Davis;
- (c) That the application represented Bentesan Weisman as the owner of 50 shares of applicant's stock, Louis Spiegel as the owner of 500 shares, Lily Pokrass as the owner of 475 shares, Helen Cook as the owner of 325 shares, and Hyman Ripstein as the owner of 500 shares, whereas said persons were not the true owners in fact of said stock, but held the same for and on behalf of hidden parties in interest who were the actual owners thereof and whose financial interests in applicant were concealed;
- (d) That the application represented Charles D. Cook as the owner of less than 10% of the applicant's stock whereas in fact he was the owner of one-third of the applicant;
- (e) That the application failed to state that the stock held by all the stockholders of record was transferred to voting trustees who held the stock for the benefit of persons not disclosed in the application;
- (f) That the application stated that neither the applicant nor any person mentioned in certain items of the application had ever been for five years prior to the application convicted of felony under Federal or State laws whereas in fact Charles D. Cook was on May 20, 1932,

convicted of a felony in the United States District Court for the Western District of New York; and

(g) That the application stated that Charles D. Cook had no experience pertaining to the manufacture and distribution of intoxicating liquors and that none of the officers and stock holders of applicant had any experience pertaining to the manufacture and distribution of intoxicating liquors whereas in fact two of the real owners, Charles D. Cook and Harry Davis, were engaged in illicit operations during Prohibition.

The application was executed by S. N. C. Marshuetz, Vice President of the petitioner, on January 21, 1936 (R. 194).

The theory underlying the charges made by the District Supervisor was that Louis Pokrass, Charles D. Cook and Harry Davis were the real owners of petitioner, the persons named as stockholders in petitioner's application for the basic permit being mere dummies; and that the concealment of the interests of the alleged real owners was motivated by the fact that they had been engaged in illicit liquor operations during Prohibition.³

The pivotal issue of fact litigated before the Hearing Officer was as to whether said Pokrass, Cook and Davis were the real owners of petitioner when application was made, or not. If they were not, then their prior activities would be immaterial.

Petitioner contended at all stages of the administrative proceeding that the stockholders of the petitioner

³ As to alleged illicit activities of Pokrass, Cook and Davis, it may be noted (1) the Hearing Officer found as to Pokrass that nothing in the record indicated "that he was not eligible for a permit at the time the application was filed" (R. 275); (2) of the three only Cook, named as a stockholder in the application, was shown ever to have been convicted, viz., a single conviction for transportation, occurring about four years before the application. The court below found the offense to have been a felony, petitioner contending it was a misdemeanor.

when the application was made were the persons named as such in the application and that the Government's evidence failed to show that the aforesaid Pokrass, Cook and Davis were the owners of the petitioner (R. 277-8, 313, 330). Petitioner further contended that an order annulling an application must meet a high standard of certainty and that before the Commissioner could annul a permit justification for a finding of fraud, misrepresentation, or concealment must clearly appear (R. 205, 313, 330). Petitioner also contended at all stages of the administrative proceeding that it was entitled to a Wholesaler's Basic Permit as a matter of right (R. 13, 308, 326).

In its petition for review by the court below, petitioner called attention to the official connection between the Hearing Officer and the District Supervisor (R. e) and contended that the orders appealed from were arbitrary and capricious (R. j).

III. Jurisdiction of This Court

The jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 347(a) (Judicial Code, Sec. 240(a) amended), and under Sec. 4(h) of the Federal Alcohol Control Administration Act (49 Stat. 977, 27 U. S. C., Sec. 204(h)). The order and decree to be reviewed was filed on October 8, 1945 (R. 359). The petition is timely within the requirements of Title 28, U. S. C., Sec. 350 (Judicial Code, Sec. 243).

IV. Statute and Regulations Involved

Section 3 of the Federal Alcohol Administration Act (49 Stat. 977, 27 U. S. C., Sec. 203) in substance makes it unlawful to operate a liquor business without obtaining a basic permit. Section 4 of the Federal Alcohol Adminis-

tration Act (27 U. S. C., Sec. 204) specifies who are entitled to basic permits. Relevant provisions of the statute are:

"Section 204. Permits

"(a) Who Entitled Thereto. The following persons shall, on application therefor, be entitled to a basic permit:

"(1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.

"(2) Any other person unless the Secretary of the Treasury finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted

"(e) Revocation, Suspension and Annulment. A basic permit shall by order of the Secretary of the Treasury, after due notice and opportunity for hearing to the permittee, or (3) be annulled if the Secretary finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order.

"(h) Appeal; Procedure. An appeal may be taken by the permittee or applicant for a permit from any order

of the Secretary of the Treasury denying an application for, or suspending, revoking, or annulling, a basic permit. Such appeal shall be taken by filing, in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, within sixty days after the entry of such order, a written petition praying that the order of the Secretary be modified or set aside in whole or in part Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary or unless there were reasonable grounds for failure so to do. The finding of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive The judgment and decree of the court affirming, modifying or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 346 and 347 of this Title"

Applicable portions of the regulations involved in this case are set out in the appendix.

The 21st Amendment to the Constitution became effective December 5, 1933. At that time the National Industrial Recovery Act (48 Stat. 195) was in effect and regulation of the liquor industries was placed under Codes of Fair Competition provided for by such Act. By executive order of the President an administrative board known as the Federal Alcohol Control Administration was created. Permits to engage in the various liquor industries were issued under such Codes to distillers, rectifiers, wine producers, bottlers, warehousemen and wholesalers. All of

such permits, except the wholesale permits, were issued by the Administrator of the Federal Alcohol Control Administration after investigation of the applicants by federal agencies. The permits to wholesalers were issued by the Wholesale Code Authority.

On May 26, 1935, the Supreme Court of the United States rendered its decision in the case of *Schechter Poultry Corporation v. United States*, 295 U. S. 495, which nullified the National Industrial Recovery Codes and had the effect of terminating the control of the Federal Alcohol Control Administration. Following this the Federal Alcohol Administration Act was passed by Congress on August 29, 1935.

By the Reorganization Act of 1939, the Reorganization Plan No. III (H. R. Doc. No. 681, 76th Cong., 3rd Sess.) prepared by the President and transmitted by him to Congress on April 2, 1940, and the Joint Resolution of June 4, 1940 (Pub. Res. No. 75, 76th Cong., 3rd Sess.), it was provided, effective on June 30, 1940, that:

"The Federal Alcohol Administration, the offices of the members thereof, and the office of the Administrator are abolished, and their functions shall be administered under the direction and supervision of the Secretary of the Treasury through the Bureau of Internal Revenue in the Department of Treasury."

By Treasury Order No. 30 of the Secretary of the Treasury, effective June 30, 1940, the aforesaid functions of the aforesaid former Administration and of its members and Administrator were delegated to the Deputy Commissioner of Internal Revenue in Charge of the Alcohol Tax Unit, Treasury Department. (Code of Federal Regulations, Title 26, Part 171, Subpart B, Section 171.4a; 5 Fed. Reg. 2212).

Subsequently, by regulation, the power and duty to annul basic permits under the provisions of the Federal Alcohol Administration Act theretofore vested in the aforesaid Deputy Commissioner by the aforesaid Treasury Order were also delegated to the District Supervisors of the Alcohol Tax Unit, to be exercised by them, subject to the supervision and direction of the said Deputy Commissioner. (Code of Federal Regulations, Title 26, Part 171, Subpart B-1, Section 171.4(e) (T.D. 4982); 5 Fed. Reg. 2549).

V. Questions Presented

The following questions are presented:

1. Did the administrative procedure followed by the Bureau of Internal Revenue, Alcohol Tax Unit for determining the basic and essential finding that the petitioner's permit was procured by fraud, or misrepresentation, or concealment of material fact accord petitioner the hearing to which petitioner was entitled under Section 204(e) of the Federal Alcohol Administration Act?
2. Was petitioner entitled to a Wholesaler's Basic Permit as a matter of right under Section 204(a)(1) of Federal Alcohol Administration Act since it held on May 25, 1935, a basic permit as an importer of liquor issued by the Federal Alcohol Administration.

VI. Reasons for Allowance of Writ

1. Important questions of administrative law are involved. The decision of the court below, and the challenge made in this petition to the procedure followed by the Bureau of Internal Revenue, Alcohol Tax Unit, in annulling petitioner's basic permit, raise fundamental questions of substance and procedure under the Federal Alcohol Administration Act. Such issues present sufficient reason for

granting certiorari. *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U. S. 134, 84 L. Ed. 656, 60 Sup. Ct. 437; *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470, 84 L. Ed. 869, 60 Sup. Ct. 693; rehearing denied, 309 U. S. 642, 84 L. Ed. 1037, 60 Sup. Ct. 693.

Section 204 (e)(3) of the Act provides that a basic permit shall by order of the Secretary of the Treasury, after due notice and opportunity for hearing to the permittee, be annulled if the Secretary finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. It further provides that the order shall state the findings which are the basis for the order.

Section 204(h) provides for judicial review of any order annulling a basic permit but provides that the findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive.

No administrative procedure is statutorily prescribed. Congress plainly intended to impose upon the Secretary a quasi-judicial function in respect of the annulment of a basic permit. The Secretary was bound to provide a proper quasi-judicial hearing process for determining the basic and essential fact as to the existence or non-existence of fraud, or misrepresentation, or concealment of material fact in the procurement of a basic permit sought to be annulled.

The procedure prescribed failed to accord petitioner and other permittees the opportunity for a fair quasi-judicial determination of the basic and essential facts upon which valid exercise of the power of annulment depends.

Under the procedure provided by regulations promulgated by the Secretary and applied in this case, the function of adjudication as to the existence of fraud, misrepresentation, or concealment of material fact has been delegated

to the District Supervisor. That official is also clothed with the functions of instituting annulment proceedings, after forming an opinion that good cause for annulment exists, and of prosecuting annulment cases. Such a union of the prosecuting and adjudicating functions, although not in itself improper in administrative proceedings, necessitated the provision by the Secretary of an adequate review procedure, whereby the decisions of the District Supervisor would be open to a review adequate in scope by the Deputy Commissioner.

Under the hearing procedure prescribed and followed the District Supervisor's determination is subject only to limited review by the Deputy Commissioner. The scope of such review is confined to the determination as to whether the evidence was sufficient, if the case were tried to a jury, to justify a refusal to direct a verdict for the defendant. This limitation has the effect of vesting in the District Supervisor power conclusively to determine the issues of fact upon which the power of annulment depends.

In providing and applying such hearing procedure the Secretary has failed to fulfill the purpose and intention of Congress. The Circuit Court of Appeals, in refusing to reverse the action of the respondents, has in effect approved such failure to grant petitioner an opportunity for a fair hearing on the issues of ultimate fact on which petitioner's economic life or death hangs.

The determination as to whether petitioner has received the hearing granted by Section 204(e) of the Act is no intrusion upon the administrative domain. It is no more or no less than the insistence upon the observance of that which Congress has made prerequisite to the annulment of petitioner's permit. See *Howard Hall Co. v. U. S.*, 315 U. S. 495, 62 S. Ct. 732, 86 L. Ed. 986; *U. S. v. Carolina Freight Carriers Corporation*, 315 U. S. 475, 475, 62 S. Ct.

722, 86 L. Ed. 971; *Ashbacker Radio Corp. v. Federal Communications Commission*, U. S. Supreme Court, 1945 Term, No. 65, decided December 3, 1945, reported in 90 L. Ed. 119, 66 Sup. Ct. 148.

2. In refusing to hold that the petitioner was entitled to a Wholesaler's Basic Permit as a matter of right the court below has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

Section 204 (a)(1) of the Act provides in plain and clear language that the holder of a basic permit as a distiller, rectifier, wine producer or importer on May 25, 1935, is entitled as a matter of right to another basic permit. It does not limit the type of other basic permits to which a holder is entitled.

The administrative agency has, however, limited the statutory right to basic permits of the same class only.

The court below has failed to follow the clear language of the statute. The court has thereby ruled in effect that an administrative agency may by regulation, alter, amend or extend a statute. Its decision to that extent failed to follow and is in conflict with the rules established by this Court in *Morrill v. Jones*, 106 U. S. 466, 27 L. Ed. 267, 1 Sup. Ct. 423; *U. S. et al. v. Missouri Pacific R. R. Co.*, 278 U. S. 269, 73 L. Ed. 322, 49 Sup. Ct. 133; *U. S. v. Goldenberg*, 168 U. S. 95, 42 L. Ed. 394, 18 Sup. Ct. 3; *Palmer v. Hoffman*, 318 U. S. 109, 114, 87 L. Ed. 645, 63 Sup. Ct. 477; *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 88 L. Ed. 428, 64 Sup. Ct. 1215.

The Court in these cases firmly established the rule that where no ambiguity exists there is no room for construction, and further, that an administrative agency cannot by its regulations engraft into the body of a statute a limitation which Congress did not think it necessary to prescribe.

3. The answer to the questions herein presented affect numerous applicants and holders of permits throughout the United States. The public importance of the questions, therefore, is obvious. Research fails to disclose that the Court has yet construed the sections of the statute under consideration by this petition or judicially commented on the powers exercised thereunder by the administrative agency, although the construction and proper exercise of power thereunder governs the issuance and annulment of permits involving a large number of business owners located throughout the Nation, employing thousands in help and owning investments of many millions of dollars. This Court will grant a writ of certiorari where an interpretation of an important provision of a Federal statute and the powers of a Federal administrative agency thereunder are involved. It has likewise been held that such a writ will be granted where a decision with respect to the enforcement of such a statute and such powers constitutes a precedent of general application. *Del Vecchio v. Bowers*, 296 U. S. 280, 285, 80 L. Ed. 229, 56 Sup. Ct. 190.

It is respectfully submitted that this petition for a writ of certiorari to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit should be granted, and the judgment and decree of the Circuit Court should be reversed.

JOSEPH P. TUMULTY, JR.
Counsel for Petitioner